

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAFEH ABUNAB,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2014

No. 316548

Wayne Circuit Court

LC No. 12-009935-FH

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of fourth-degree criminal sexual conduct, MCL 750.520e, and assault or assault and battery, MCL 750.81. The trial court sentenced him to 100 days in jail for assault or assault and battery and to five years' probation for fourth-degree criminal sexual conduct. We affirm.

Defendant contends that the trial court erred in allowing the prosecutor to introduce prior-bad-acts evidence. We disagree.

The decision whether other-acts evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

MRE 404(b) governs the admission of other-acts evidence:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For other-acts evidence to be admissible under MRE 404(b), the evidence: (1) must be offered for a proper purpose; (2) must be relevant under MRE 402, as enforced through MRE 104(b);

and (3) must have probative value that is not substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

A proper purpose means a purpose other than showing propensity or character. See *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In this case, the prosecution offered the evidence in order to establish that defendant used a common plan or scheme. The prosecution also offered it to prove a lack of mistake or accident by defendant. These purposes are included within MRE 404(b).

The scheme or plan does not need be distinctive or unusual; evidence of prior bad acts can be admissible if it indicates a method by which, or circumstances under which, the defendant committed the charged crime. See *People v Sabin*, 463 Mich 43, 66; 614 NW2d 888 (2000). The evidence demonstrated that defendant acted using a common plan or scheme for committing the offenses. In both defendant's 1994 conviction and the instant case, the victims were young, female workers for defendant's photography business. In each incident, the victim was alone with defendant in his photography studio located at 29106 Van Born in Dearborn Heights. Defendant inappropriately touched the victims in a similar manner by grabbing each victim from behind, while the victim was working at a desk.

Also, the other-acts evidence was offered in order to demonstrate a lack of mistake or accident by defendant. The complainant testified that defendant claimed that grabbing her buttocks was an accident. The bad-acts evidence helped to demonstrate that defendant's actions were neither mistaken nor accidental, but rather, that defendant purposely or intentionally grabbed the complainant. Thus, the evidence was proffered for proper purposes.

With respect to relevancy, "[r]elevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford*, 458 Mich at 387. A fact is material if it is in issue, or within the range of litigated matters in controversy. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Evidence of prior bad acts is logically relevant where the bad act and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system the defendant employed in committing the charged offense. *Sabin* 463 Mich at 63. In this case, the prior bad act was relevant because it tended to show that defendant had a common plan or scheme of hiring young, female workers for his photography business, inappropriately touching these female workers while they worked in his studio, and then denying culpability. Further, the prior bad act was relevant because the question of whether defendant's inappropriate touching was mistaken or accidental was a material fact at issue in the case.

With respect to the probative value of prior bad acts versus the prejudicial effect, unfair prejudice occurs when there is a tendency that the bad-acts evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the bad-acts evidence. *People v Waclawski*, 286 Mich App 634, 672; 780 NW2d 321 (2009). "The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony." *Id.* at 670.

Here, the probative value of the evidence was not substantially outweighed by any potential for unfair prejudice. Defendant's prior bad act was offered to prove that defendant acted within a common plan or scheme in order to inappropriately touch his female workers, and also to show that defendant's actions were neither mistaken nor accidental. As such, it was highly probative. Further, any potential for unfair prejudice was abridged by the trial court's limiting instruction informing the jury that the bad-acts evidence should only be considered for the purposes of proving a plan, system, or common scheme, or a lack of mistake or accident. "A carefully constructed limiting instruction rendered by the trial court would be sufficient to counterbalance any potential for prejudice spawned by the other acts evidence." *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002). A jury is presumed to follow the instructions given to it. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). It is presumed that the jury properly followed the limiting instruction and only considered the prior evidence for the proper purposes. The trial court did not abuse its discretion in allowing the introduction of the other-acts evidence.<sup>1</sup>

Affirmed.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Michael J. Kelly

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<sup>1</sup> We reject defendant's assertion that the form of the evidence was improper. The jury was properly allowed to hear the circumstances surrounding the prior incident in order to properly assess its value.